1986

Denise A. Hirsch v. Frank L. Hirsch : Appellant's Reply Brief to Brief or Respondent

Utah Supreme Court

Nolan J. Olsen; Attorney for Respondent; .
Cathryn Jamison Judd; Attorney for Appellant.

IN THE SUPREME COURT

OF THE STATE OF UTAH

DENISE A. HIRSCH, Plaintiff-Appellant	*	APPELLANT'S REPLY TO
vs.	*	BRIEF OF RESPONDENT
FRANK L. HIRSCH, Defendant-Respondent	*	Case No. 20966

APPEAL FROM THE ORDER OF

THE THIRD JUDICIAL DISTRICT COURT FOR THE COUNTY OF SALT LAKE

HONORABLE JUDGE DEAN E. CONDER, JUDGE

NOLAN J. OLSEN
Attorney for Respondent
8138 South State Street
Midvale, Utah 84047

CATHRYN JAMISON JUDD
Attorney for Appellant
660 South 200 East, Suite 100
Salt Lake City, Utah 84111

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STATEMENT OF THE CASE

This is an action in Divorce, arising from defendant-respondent's Petition for Modification of Decree of Divorce, seeking custody of the minor child, Cody, age, five years old.

DISPOSITION IN LOWER COURT

The Honorable Judge Dean E. Conder of the Third District Court, having made Findings of Fact and Conclusions of Law, entered an Order Modifying Decree of Divorce, changing custody of the minor child from mother to the father.

RELIEF SOUGHT ON APPEAL

Appellant-mother seeks reversal of said modification, and requests that custody of her child be returned to her.

STATEMENT OF FACTS

The parties disagree on several points in their statement of facts. Respondent's brief states that he had "custody" of the minor child prior to the entry of the Decree of Divorce, and from April 1984 until February 1985. Such statements are incorrect in that the term"custody" implies possession, care and control of a child pursuant to an Order of the Court.

Prior to May of 1984 there was no court Order of custody of this child. From May of 1984 until February of 1985 appellant-mother did in fact have legal custody of the child pursuant to the Decree of Divorce. Therefore, respondent's claim of having "custody" for these periods are simply untrue, misleading, and a misrepresentation of the actual circumstances.

Respondent's brief incorrectly states that appellant-mother's last move was to the state of California (p.2 of respondent's brief). The correct statement of fact is that appellant-mother's last move was back to the state of Utah to West Valley City, where she has now resided since April of 1985.

Appellant-mother's husband did not state (as claimed by respondent, p. 2) that he wanted respondent-father to take custody of the child. His actual statement from the transcript (p. 35, L11-13) was:

> "I wanted him to take him when me and Denise had a honeymoon, to take Cody for a month, is what I said."

Appellant-mother's husband never requested that there be

an actual change in custody of the child.

Respondent's brief refers in several places to appellant-mother's use of cocaine (respondent's brief p. 2, 3, 6, 9). A review of the transcript shows that the only evidence or reference to use of cocaine was that she used it "once or twice, years ago" (Transcript p. 85,L25). In fact, the only time she tried it was with respondent-father before the child Cody was ever born.

There was no evidence that even suggested the use of cocaine after the child was born, or after the entry of the Decree of Divorce. Respondent's repetitive reference to appellant's cocaine use is inappropriate, without basis in fact, and is highly prejudicial.

Respondent-father's claim of having established that he had possession of the child a majority of the time, is untrue. Even the Trial Court did not make a finding as to which party had possession of the child a majority of the time,as this was a highly disputed issue in this matter, and in its remarks the Court stated (Transcript p. 98) as follows:

> "The evidence is very contradictory as to who Cody was actually living with. You say he was living with you during that time and she says no, he was living with me. This one says no, he was living with her, and they say no, he was living with you and you say Judge, in your great wisdom, tell us which one of these two, where he was actually living with. That's difficult to do."

Even the Findings of Fact do not state which parent had possession of the child a majority of the time.

ARGUMENT

I. THERE IS NO BASIS FOR A FINDING BY THE TRIAL COURT OF A SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES.

The prevailing rule of law on the issue of changing prior order of custody of minor children is set forth in the case of Hogge v. Hogge, 649 Pac 2d 51 (Utah 1982).

The Supreme Court in that case set forth the requirement of a two-step procedure in modifying a prior custody order. The first step requires a finding that a "substantial" and "material" change of circumstance must have occured "since time of previous decree" to warrant a change in custody. If such a findings is made then the second step is to make a determination, de novo, as to custody based on the best interests of the child.

Respondent relies on three claimed changes in circumstances throughout his brief, as follows:

A. POSSESSION OF THE CHILD. Respondent-father claims he had possession of the child a majority of the time before the decree of divorce was entered, therefore, his objection to the mother being awarded custody should have been pursued prior to entry of the original decree. He voluntarily agreed that mother should have custody of the child prior to the entry of the decree, and therefore that issue is now res judicata, and can not be modified as he has not shown a "substantial" and "material" change in circumstances since the entry of the decree on that basis.

B. APPELLANT MOTHER'S CHANGE OF RESIDENCE. There is evidence that appellant-mother moved several times. However there is no evidence that these moves were detrimental in any way to her ability to care for the child, or had any effect on the child's well-being. It is only reasonable that a person who has moved out of a marital home, been single for a while, and remarries is going to have a change in residence.

There was no evidence as to how may times appellant-mother moved prior to the entry of the divorce decree, and how may times she moved after entry of the decree. Therefore, again there is no showing that this change of residence was a "substantial" and "material" change in circumstance, and the issue is now res judicata. Respondent-father should have raised this issued prior to the entry of the original decree.

C. COCAINE USE. As stated previously, the only evidence as to the use of cocaine was that appellant-mother had tried it "once or twice, years ago". There is absolutely no evidence that any cocaine use took place after the entry of the decree. Therefore, this basis for claim of changed circumstances is also without merit.

The trial court therefore, abused its discretion in finding a change of circumstances. Respondent-father simply did not meet his burden of proof, as there was no real basis for a finding of a change in circumstances since the decree of

divorce was entered.

II. THERE IS NO BASIS FOR A FINDING THAT IT IS IN THE BEST INTERESTS OF THE CHILD TO BE IN THE CUSTODY OF RESPONDENT-FATHER.

In making a determination on the second step of the change in custody process, the Court must look to what is reasonable and necessary for the best interests of the child. The factors to be considered are set forth in Hutchinson vs. Hutchinson, 649 Pac 2d 38, and it is doubtful that the trial court considered those guidelines in making its decision.

In fact, the trial court felt that this was not a clear cut case and obviously had some serious doubts about its decision in this matter, stating in the memorandum decision:

> "The Court has agonized long and hard as to what will be best for Cody".

However, the trial court did find that both parties were adequate parents, and in view of the guidelines set forth in Hutchinson, supra, it is clear that a change in the prior custody order was an abuse of discretion.

The following factors weigh heavily in showing that the best interests of the child would more readily be served by appellant-mother retaining custody of the child:

A. The child has a strong bond with both parents.

B. Appellant-mother is at home during the day and can provide personal care for the child.

C. Respondent-father works long hours and must hire surrogate care for the child.

D. Mother is married, has a stable marital relationship, and can provide a normal family situation for the child.

E. Father remains single, and can not provide the child with a stable family unit.

F. The child is only five years old, an age where he is still in need of the care and nurturing of his mother.

The appellant-mother's only flaw, if it can be considered a flaw, was to allow respondent-father liberal visitation with her son. The evidence shows that she tried to act reasonably in regard to visitation so that father and son could maintain their relationship, while she maintained the care and custody of the child. In fact, she unknowingly had all along created the ideal custodial parent situation which Judge Conder described in his closing statements to the parties from the bench, as follows:

> "I would like to see Cody grow up to know both of you as his parents. The ideal situation would be to have it so that if Cody wanted to go and visit you, Frank, this afternoon, he could hop on the bus, or if he went down into the neighborhood and went where he was and he would see Frank. If he wanted to spend tomorrow with Denise because she was going to do something, he would do that. He should grow up feeling that you two are his parents. And he has the right to go in your home just as he had it before. He's your child and he's free to come and go to your home as your child." (Transcript p.98 L19 - p.99 L4)

It seems that the mother's willingness to cooperate with her ex-husband with liberal visitation is being used against her in this matter, which is highly inequitable, both

to appellant-mother and to the child.

There was no showing that the liberal visitation rights which respondent-father enjoyed decreased the child's bond with his mother, or reduced the mother's ability to parent her only child. On the contrary, it shows her ability to act rationally and with maturity in the area of visitation, an area which is all too commonly used by custodial parents in an attempt to spite an ex-spouse. Appellant-mother should be commended for encouraging the father-son relationship, while maintaining her care and custody of the child, and not have this attribute used against her in this matter.

CONCLUSION

Appellant submits that respondent's interpretation of the facts and the arguments, as applied to this case, unduly misrepresent the true situation of the parties and the minor child who is the subject of this action.

In his Petition for Modification of Decree of Divorce, it is respondent-father's burden to prove that a "substantial" and "material" change of circumstances occured after entry of the Decree of Divorce (May 1984), and that it is in the best interests of the child that the prior custody order by changed.

The record shows that respondent-father simply did not meet his burden of proof in this matter, and the Court abused its discretion by ordering a change of custody without basis

as required by this Supreme Court in the rules of law set forth in Hogge vs. Hogge, supra, and Hutchinson vs. Hutchinson, supra.

Appellant-mother respectfully requests that the trial courts Order Modifying Decree of Divorce be reversed, and that she be allowed to retain custody of her only child, Cody.

Respectfully submitted,

Cathryn Jamison Judd

CATHRYN JAMISON JUDD
Attorney for Appellant

CERTIFICATE OF SERVICE

It is hereby certified that four copies of the foregoing Appellant's Response to Brief of Respondent were hand delivered to attorney for respondent, Nolan J. Olsen, at 8138 South State Street, Midvale, Utah 84047 on this 4 day of March, 1986.

Cathryn J. Judd